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April 10, 2004

Via Email and Regular Mail

Robert Kelter
Citizens Utility Board
208 South LaSalle Street, Suite 1760
Chicago, Illinois 60604

Re: Consol. Docket Nos. 01-0705, 02-0067 and 02-0725

Dear Rob:

It has come to my attention that CUB is soliciting its members and the public in general to engage in *ex parte* communications directly with the ICC Commissioners concerning the resolution of disputed issues in this proceeding. If my understanding of CUB's activities is correct, I believe such a solicitation is improper based upon the prohibition on *ex parte* contacts contained in the Illinois Public Utilities Act and the Rules adopted by the Commission for its proceedings. Therefore, I am writing to request clarification of CUB's activities and your position on whether this apparent solicitation is proper.

Specifically, it is my understanding that CUB is engaged in a solicitation via the internet asking respondents to endorse a form letter prepared by CUB which requests that the Commission make findings in this proceeding favorable to CUB's claims. I understand that CUB is asking respondents to urge the Commission to "support ... a refund" sought by CUB from Nicor Gas in this proceeding, which CUB asserts is based upon the Company purportedly "misleading the public and cheating consumers." I also understand that CUB states in its solicitation materials that, "[y]our message will be sent to ... the following targets," and names the "ICC Commissioners."

As you know, the Act and the Rules expressly proscribe *ex parte* communications, whether directly or indirectly, between any person and the Commissioners on any disputed issue during the pendency of a contested proceeding. 220 ILCS 5/10-103; 83 Ill. Admin. Code § 200.710.¹ A Commissioner, an ALJ, or any Commission employee involved in the decisional process who receives an *ex parte* communication must disclose the communication in the public

¹ See also Section 10-60 of the Illinois Administrative Procedure Act, 5 ILCS 100/10-60, setting forth the general prohibition on *ex parte* communications in Illinois administrative cases.

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record of the proceeding. 220 ILCS 5/10-103; 83 Ill. Admin. Code § 200.710(c-d).² In the event of a violation of the prohibition on *ex parte* communications, the Commission has authority to take “whatever action is necessary to ensure that such violation does not prejudice any party or adversely affect the fairness of the proceedings.” 220 ILCS 5/10-103.

I am sure you will agree that the prohibition on *ex parte* communications before the Commission is fundamental to the fairness, impartiality, and decorum of its proceedings and serves the interests of all parties and the public in a determination on the merits. CUB has taken a strong position against *ex parte* communications in connection with prior ICC proceedings. *Bus. & Prof’l People for Pub. Interest v. Barnich*, 244 Ill. App. 3d 291, 297, 614 N.E.2d 341, 345 (1st Dist. 1993) (reversing for failure to grant intervening parties’ request to recuse Commissioner based on *ex parte* contacts during ratemaking proceeding).

I also would remind you that even unsolicited direct communications to presiding officers by the public outside the formal administrative process in favor of one party’s positions unequivocally have been found to be improper *ex parte* communications. *Waste Management of Ill., Inc. v. Pollution Control Bd.*, 175 Ill. App. 3d 1023, 1042-43, 530 N.E.2d 682, 697 (2d Dist. 1988).

Finally, the Commission has adopted the standards of conduct set forth in the Illinois Rules of Professional Conduct for persons appearing in its proceedings. 83 Ill. Admin. Code § 200.90(e). These rules recognize the need for impartiality and decorum in adversarial proceedings and prohibit *ex parte* communications by counsel, or caused by counsel, on the merits with a judge or an official before whom the matter is pending. Ill. R. Prof’l Conduct, RPC Rule 3.5(i). I assume you were unaware of the circumstances described in this letter concerning your client’s apparent solicitation of *ex parte* communications in this proceeding but draw your attention to these standards at this time

In sum, I am concerned that the *ex parte* communications CUB is soliciting here are of the kind prohibited under Illinois law. CUB is an active party to this case, and the refunds sought by CUB are a disputed issue. If CUB is soliciting direct communications outside the administrative process with the Commissioners in favor of its proposed refunds, such *ex parte* contacts raise concerns for the appearance of fairness and impartiality in this case. They also detract from the proceeding’s decorum. In this latter respect, these kinds of communications, if obtained, would burden the Commissioners, and the Office of the Clerk, with disclosing potentially numerous *ex parte* contacts to the parties, all of which then would appear in and potentially confuse the public record.

² As you know, the Illinois General Assembly recently extended this requirement with respect to *ex parte* communications to all Commission employees. P.A. 93-615, Art. 5, § 5-50, added by P.A. 93-617, § 5, eff. Dec. 9, 2003 (amending the State Officials and Employees Ethics Act).

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Put the shoe on the other foot, Rob. It would be unthinkable for Nicor Gas to solicit any person to contact any Commissioner, ALJ, or Commission employee during a contested proceeding to obtain findings in its favor. The same standard applies to CUB. Nicor Gas has reviewed CUB's claims for refunds in this proceeding. Nicor Gas believes that once the evidence has been presented and tested in the hearing room, CUB's claims will fail. No evidence has been taken, however. The *ex parte* communications CUB apparently is soliciting seek to influence the Commission's determination outside of—and prior to—the evidentiary process. No party should be allowed to try to tilt the scales of justice in its favor in such fashion, regardless how strongly that party may wish to gain advantage.

Based on the foregoing, I would appreciate your prompt attention to the matters addressed in this letter and your reply. Thank you.

Sincerely,

John E. Rooney

JER:hpd

cc: Service List